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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LESLIE DALE ARMSTRONG,

Defendant and Appellant.

E064927

(Super.Ct.No. RIF1404389)

OPINION

APPEAL from the Superior Court of Riverside County. Elisabeth Sichel and
Becky Dugan, Judges.¹ Affirmed.

Richard Power, under appointment by the Court of Appeal, for Defendant and
Appellant.

¹ Judge Sichel presided over the trial and made the only ruling challenged in this appeal. Judge Dugan presided over the sentencing hearing and entered the judgment.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Lise Jacobson and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

At a gym one day, a man asked defendant Leslie Dale Armstrong to keep his voice down; defendant hit the man in the face. After a jury trial, defendant was found guilty of battery with serious bodily injury (Pen. Code, § 243, subd. (d)), with an enhancement for personally inflicting great bodily injury (Pen. Code, § 12022.7, subd. (a)). He was placed on formal probation for three years, on conditions including six months in jail and an additional six months on work release.

Defendant's sole appellate contention is that the prosecutor committed error by commenting on defendant's failure to call a witness when there was no evidence that that witness was available. We will hold that the comment was proper and that the prosecutor was not required to lay a foundation that the witness was available. Hence, we will affirm.

I

FACTUAL BACKGROUND

On October 5, 2014, Farrokh Kia and a friend of his went to an LA Fitness gym in Riverside. Kia went to the pool while his friend went to the sauna. Kia was a Sufi, and it was his custom to start his time in the pool with meditation.

Kia's meditation was disturbed by defendant and another person, who were talking loudly in the nearby Jacuzzi. He called to them to lower their voices. In response,

defendant “jump[ed]” out of the Jacuzzi, came over to Kia, and started yelling “bad word[s]” at him. Kia was scared, but he yelled back; he said he was old enough to be defendant’s father, and he added, “Be nice and cool.”

Suddenly, defendant either hit or kicked Kia in the face.² Kia was dizzy and in pain; his own blood ran into his eyes, and he could not see. He managed to get out of the pool. Then his friend and another man came and helped him. Personnel at the front desk called the police.

Defendant got dressed and walked “slowly and calmly” out of the gym. Kia’s friend asked defendant to stop, adding that the police were on their way. Defendant kept walking and said, “Don’t try and stop me or . . . I’m going to beat the shit out of you.”

Kia’s right eye was injured and his nose was broken. It was stipulated that this constituted great bodily injury. It was further stipulated that defendant caused these injuries.

Kia was approximately 70 years old. Defendant was approximately 22 years old; in high school, he had been a first-team all-conference linebacker.

Defendant testified that he went to the gym with his then-girlfriend, Keaira Wood. They were sitting on the side of the Jacuzzi, talking, when Kia told them to shut up. Defendant replied, “You shut the fuck up.”

² At trial, Kia contradicted himself with respect to whether defendant was in or out of the pool at this point. He had told the police that defendant “jumped into the pool.”

Kia got out of the pool and came over to the Jacuzzi. Defendant stood up. He thought Kia was going to hit him. Kia did, in fact, shove him. Defendant either pushed or punched Kia, “to get him out of the way” According to defendant, he “just reacted”; he did not mean to hurt Kia. He “was acting in self-defense.” Defendant’s girlfriend was “shocked.”

Defendant denied threatening to beat up Kia’s friend.

II

PROSECUTORIAL ERROR IN CLOSING ARGUMENT

Defendant asserts prosecutorial error in closing argument, in that the prosecutor commented on defendant’s failure to call a witness who had not been shown to be available.

A. *Additional Factual and Procedural Background.*

Before closing argument, defense counsel asked the trial court to order the prosecutor not to refer to Keaira Wood in his closing, “because that would be shifting the legal burden onto the defense.”

Initially, the trial court opined that the prosecution cannot comment on the defense’s failure to call a witness unless the prosecution shows that the witness is available. However, after hearing argument, it reversed itself and ruled that the prosecution *can* comment unless the *defense* shows that the witness is *unavailable*. It concluded, “I’m going to allow you to comment.”

Accordingly, in his rebuttal argument, the prosecutor noted that Keaira Wood was the only third-party witness who “was in the room when this happened.” He added, “I found out her name sometime yesterday morning. Even had to check with the court reporter how it was spelled. His girlfriend, has been known to her^[3] since the day this happened and long before that. Why didn’t they call her as a witness?” Defense counsel stated, “[O]bjection. Shifting the burden.” The trial court overruled the objection.

The prosecutor continued: “Now, it is true we bear the burden. And I don’t for a second want you to speculate on what she would have said. That would be improper. I’m not going to give you a scenario of what she would have said because I don’t know. That would be speculation on my part, and you’re not to speculate.

But the reality is, one person could have gotten her here. He didn’t bring her here. They have ever[y] bit of the subpoena power that we do. They, obviously, have investigators But the girlfriend who saw the whole thing, who frankly is the closest thing we have to maybe a video camera, maybe the person who wasn’t heated in this discussion, they don’t bring her to court.

“You know how you can consider that? As a barometer of his credibility. Why don’t they want her here? I’ll tell you why we don’t have her here. We learned who she was yesterday.”

³ There is a dispute as to whom the prosecutor meant by “her” — defendant (even though he is male) or defense counsel (who was female). As we will discuss below, we need not resolve this issue.

At this point, the trial court interrupted to instruct the jury: “Ladies and gentlemen, I want to remind you that the burden of proof lies with the People to prove each element of the charge necessary to a conviction beyond a reasonable doubt.

“You may consider the failure to call a witness by either party as having some bearing on the credibility of the witnesses who did testify.

“I also want to remind you that you must decide the case based solely on the evidence presented in this trial. The observations of counsel are — and when they learned of someone’s presence is not part of the evidence of the trial.”

B. *Discussion.*

“[I]t is neither unusual nor improper to comment on the failure to call logical witnesses. [Citations.]” (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1275.) Doing so does not improperly shift the burden of proof to the defense. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1173, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Defendant’s argument that the witness must first be shown to be available boils down to a question of relevance. The defense’s failure to call a logical witness is relevant because it is reasonably inferable that the reason for the failure is that the witness’s testimony would be adverse to the defense. (*Martinez v. Superior Court* (1970) 7 Cal.App.3d 569, 576, disapproved on other grounds in *Mozzetti v. Superior Court* (1971) 4 Cal.3d 699, 703, 712.) This logic is sound, however, only if the witness is available. If

the witness is unavailable, then that in itself is a good and sufficient reason for the defense's failure to call the witness.

“[P]rosecutors are given wide latitude during argument and may urge the jury to draw any reasonable inference from the evidence. [Citation.]” (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1331.) Given the “principle that ““the public . . . has a right to every man's evidence”” [citation]” (*People v. Sinohui* (2002) 28 Cal.4th 205, 213), and given the considerable investigatory and subpoena powers available to enforce that principle, it is a reasonable inference that witnesses are ordinarily available. Certainly in other contexts the party asserting that a witness is unavailable has the burden of proof. (*People v. Foy* (2016) 245 Cal.App.4th 328, 338-339.) Thus, in the absence of evidence affirmatively demonstrating that a witness is unavailable, it is within the scope of permissible prosecutorial argument to ask the jury to draw an adverse inference from the defense's failure to call a logical witness.

This view finds support in *People v. Ford* (1988) 45 Cal.3d 431. There, the evidence showed that the defendant and several accomplices first cased and then burglarized a house. (*Id.* at p. 436.) The defendant presented an alibi defense; he testified that, when he was supposedly casing the house and again when the burglary occurred, he was at other locations with two of his alleged accomplices. (*Id.* at pp. 437-438.) In closing argument, the prosecutor asked rhetorically why, if the defendant was telling the truth, he had not called these two supposed alibi witnesses. (*Id.* at p. 438.)

The defendant argued that, because his alleged accomplices could have exercised the privilege against self-incrimination, they had to be deemed unavailable. (*People v. Ford, supra*, 45 Cal.3d at p. 439.) The Supreme Court disagreed, primarily because, if the alleged accomplices would have supported the defendant's alibi, then they would not have had to incriminate themselves, and thus they could not have claimed the privilege. (*Id.* at p. 442.) It also noted that the alleged accomplices might have been willing to waive the privilege if necessary to exculpate the defendant. (*Id.* at pp. 442-443.)

The Supreme Court specifically rejected the argument that the prosecution had the burden of showing that the witnesses were available: "The prosecutor cannot know, much less prove whether a witness would testify if asked to do so by the defendant. It is the defendant whose testimony has created the situation that makes the person a logical exculpatory witness. *There is nothing unfair in requiring the defendant to bear the burden of establishing that the reason the witness was not called is that he is 'unavailable' because he has exercised a privilege.*

"A blanket rule forbidding comment if the defendant does not do so would encourage and license perjury. The defendant would be assured that no matter how transparently perjured his testimony, there would be no burden on him to call witnesses who might be expected to corroborate it without incriminating themselves, and the prosecutor would be prohibited from commenting on his failure to call those logical witnesses. The facts of this case persuaded us that such a rule is not compelled and should not be adopted. *The effort to ascertain the truth is far better served by requiring*

that the defendant who has offered the testimony bear the burden of establishing that the corroborating witnesses are actually ‘unavailable’ because they hold a privilege by calling them.” (People v. Ford, supra, 45 Cal.3d at p. 443, italics added.)

Here, similarly, defendant’s testimony created the situation that made Wood a logical exculpatory witness. Accordingly, if defendant objected to prosecutorial comment on her failure to testify, it was not unfair to require him to bear the burden of establishing that she was unavailable. We see no reason to treat unavailability due to the assertion of a privilege any differently from any other kind of unavailability.

Defendant relies on *People v. Stankewitz* (1990) 51 Cal.3d 72. There, the evidence showed that the defendant was accompanied by four acquaintances (who were also arguably accessories) when he committed the charged crimes. (*Id.* at pp. 81-83.) The prosecution called only one of these four acquaintances. (*Id.* at p. 102.) In closing argument, defense counsel stated: ““And I think that the fact that those people are absent *when they are available* is something that you should give great consideration to.”” (*Ibid.*, italics added.) The prosecutor objected that there was no evidence that these witnesses were available; the trial court sustained the objection. (*Ibid.*) The Supreme Court held: “The prosecutor’s objection was properly sustained. Nothing in the record indicated whether [the other three witnesses] were available. It is axiomatic that counsel may not state or assume facts in argument that are not in evidence.” (*Ibid.*)

Here, unlike in *Stankewitz*, the prosecutor did not affirmatively represent that Wood was available; rather, as in *Ford*, he simply relied on defendant's failure to prove that she was unavailable. This was perfectly permissible.

Defendant also argues that the prosecutor stated a fact that was not in evidence by describing Wood as defendant's "girlfriend." Defense counsel forfeited this asserted error by failing to object on this ground at trial. (*People v. Seumanu, supra*, 61 Cal.4th at p. 1363.) Even if not forfeited, the argument lacks merit, because defendant specifically testified that Wood was his "girlfriend" at the time.

Finally, defendant argues that the prosecutor also stated facts not in evidence by representing that he had only just learned Wood's name, whereas Wood's identity had long been known to "her." Defendant takes "her" to refer to his trial counsel, who was female. The People argue that "her" was just a slip of the tongue; since the prosecutor then went on to say that the unspecified person had known about Wood "since the day this happened and long before that," apparently he meant *defendant*. Even if so, the prosecutor's separate assertion that he had only just learned Wood's name was improper. (*People v. Hill* (1998) 17 Cal.4th 800, 827-828 [referring to facts not in evidence is misconduct because such statements offer unsworn testimony not subject to cross-examination].) Again, however, defense counsel forfeited this error by failing to object on this ground at trial. In addition, it does not appear that the impropriety was prejudicial, in light of the trial court's admonition that "you must decide the case based

solely on the evidence The observations of counsel . . . and when they learned of someone's presence is not part of the evidence”

We therefore conclude that defendant has not shown any prejudicial prosecutorial error in closing argument.

III

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.